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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF PERRYTON,
Petitioner

v.

DONALD W. JACKS and wife,
BONNIE JACKS
Respondents

PETITION FOR WRIT OF CERTIORARI

From The United States Court of Appeals
For The Fifth Circuit

LEMON, CLOSE, SHEARER,
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QUESTION PRESENTED FOR REVIEW

Did the jury instructions adequately submit the controlling factual issue of whether the City of Perryton knew or should have known of leaks in its gas pipeline in the area of the accident?

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NO._____

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PETITION FOR WRIT OF CERTIORARI

From The United States Court of Appeals
For The Fifth Circuit

To The Honorable Supreme Court Of The United States:

NOW COMES THE CITY OF PERRYTON, Petitioner (hereafter the "City" or "Perryton"), and files this Petition for Writ of Certiorari and would show as follows:

OPINIONS BELOW

1. The December 27, 1983, opinion of the Court of Appeals for the Fifth Circuit is attached.

2. The District Court for the Northern District of Texas, Amarillo Division, did not issue an opinion in this case.

STATEMENT OF JURISDICTION

1. The judgment of the Court of Appeals is dated December 27, 1983.

2. The Petition for Rehearing by Petitioner herein was denied on January 27, 1984.

3. This Court has jurisdiction under 28 U.S.C. § 1254.

RULES INVOLVED IN THIS CASE

1. Federal Rule of Civil Procedure 49(a) provides as follows:

> (a) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

2. Rule 17.1 of this Honorable Court generally states that special or important reasons for granting a writ of certiorari include the decision of a federal court of appeals on an important question of federal law which has not been, but should be, settled by this Court or which has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Such is the case at bar.

STATEMENT OF THE CASE

Donald W. Jacks and wife, Bonnie Jacks, Oklahoma residents, were plaintiffs in this case against the City of Perryton, Texas, and the First National Bank of Perryton, and the basis for federal jurisdiction in the court of first instance was the complete diversity of citizenship of the parties. Mid-Continent Casualty Company intervened to recover its statutory workers compensation lien.

The case was submitted to the jury on November 23, 1982, by means of the trial court's charge and special verdict which submitted written questions susceptible of categorical or other brief answer. The jury found that Perryton was negligent in (a) failing to timely install cathodic protection for its gas distribution system, (b) failing to maintain a six-inch gas main and service line, and (c) failing to replace a six-inch main. The Bank was exonerated by the jury, and judgment was rendered for the plaintiffs against the City. The Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court.

Donald W. Jacks on April 18, 1979, was employed as a construction superintendent for a company which contracted to build a drive-in banking addition for the

Bank. A culvert was placed in an underground tunnel underneath the drive-in lanes, and water had been collecting in that culvert during rains. It had rained the previous night, and Mr. Jacks went into the tunnel to see how much water had collected in it. He did not have a flashlight with him and used a cigarette lighter to illuminate the darkened tunnel. As he flicked the lighter, a resulting explosion injured him.

No gas lines served the existing building being added onto by this construction project. Perryton's nearest gas line was a 6 - 8 ounce, low pressure line over eighty feet away from the culvert or tunnel. That gas line was part of the gas distribution system acquired by Perryton in 1958 from a private company. While this original low pressure line was approximately fifty-two years old at the time of the accident, it was uncontradicted that for over a year Perryton had no notice of any leaks in the alley where its nearest low pressure gas line was buried.

There was most certainly a fact issue as to whether the City should have known of the gas leaks in this area. Perryton employed an outside firm to conduct an annual survey on April 22, 1978, a year before this explosion, and no leaks were detected in that area. In May of 1978, less than a year before the April 18, 1979, occurrence, the six-inch low pressure main buried in the alley nearest this tunnel was cathodically protected by an independent contractor. First, the current flow was checked every ten feet or at even narrower distances at points considered to be corrosive. At those points, a check was made for an existing gas leak by the bar hole method which involves punching a hole and checking the hole with a combustible gas indicator for any escaping gas. No leak was

reported by the contractor in this low pressure main in the alley in question or in the blocks to the north or south.

After the cathodic survey was completed, another crew installed magnesium anodes at the locations indicated by the survey. This process involved digging down to and below the six inch gas main to weld onto it a wire connecting the main to an anode installed a few feet away from and lower than the main. This was done at five different places in this particular alley, and that alley main in question was thus excavated at each of those five places. Again, there were no reported leaks.

The first notice that the City had of any leaks in this alley was during the investigation of this accident. When the entire low pressure alley main was uncovered with a back hoe, some leaks were discovered, but the process of excavation could have contributed to the size of those leaks. Also, the leaks were over eighty feet away from the culvert where the explosion occurred.

At the close of all of the evidence, the City moved for a directed verdict which was overruled. Its motion for judgment notwithstanding the verdict asserted that any dangerous condition that would have arisen with respect to the six inch main and nearby service lines was traceable to natural causes. As a result, the Plaintiffs thus had the burden of showing that the City had actual notice of the dangerous condition or that the condition had existed for such a length of time that in the exercise of ordinary care the City should have known of it. That motion filed on December 1, 1982, was not overruled by the trial court until April 8, 1983.

The initial draft of the Charge of the Court summarized the Plaintiffs' allegations substantially as set forth in the

final one copied in the Appendix hereto at page A-9. It stated that the Plaintiffs alleged that the City failed to install cathodic protection for its gas distribution system

> ". . . when it knew or, in exercise of ordinary care, should have known that the system was being harmed by the process of electrolysis. . . ." (Tr. II, 336).

The language quoted above was initially included in the trial court's draft of Special Issue ("S/I") 1(a), substantially as follows:

> "Special Issue No. 1
>
> Do you find from a preponderance of the evidence that the City of Perryton was negligent (a) in failing to install cathodic protection when it knew or in the exercise of ordinary care should have known that the system was being harmed by the process of electrolysis . . . ?"

However, the phrase in S/I 1(a) on actual or constructive knowledge was deleted upon objection of the City's attorney with the consent of the Plaintiffs' attorney (Tr. IX, 1009). By oversight, the same language was left in the summarization of the Plaintiffs' allegations that appear at page 9 of the Appendix. Nevertheless, it is clear from the deletion of the phrase from S/I 1(a) itself that the trial court chose to not submit actual or constructive notice.

After the deletion from S/I 1(a) was decided upon, Perryton requested an issue or instruction requiring the jury to find actual or constructive notice before deliberating on negligence in any of the three respects covered

in S/I 1. This objection to the Charge clearly informed the trial court that S/I 1(a), 1(b) and 1(c):

> ". . . were not predicated on another special issue or an instruction of the court to the effect that the condition as to the six inch main and service line under the City's control had to have existed for such a length of time that in the exercise of ordinary care a distributor should have known of the condition and any need to maintain or repair the same." (Tr. IX, 1013).

The objection continued that before any duty arises, the predicate of either actual or constructive notice should be submitted to the jury as an issue or instruction. The objection was refused (Tr. IX, 1013).

In the opinion in this case, Justice Politz of the United States Court of Appeals for the Fifth Circuit wrote that the City's interpretation of Texas law was properly stated (Appendix p. 3). That court nevertheless held that the summary of the Plaintiffs' allegations that "the City failed to install cathodic protection for its gas distribution system when it knew or in the exercise of ordinary care should have known that the system was being harmed by the process of electrolysis" adequately charged the jury as to that controlling provision of Texas law. The opinion continued:

> "There can be little doubt that the requirement of an antecedent finding of either actual or constructive knowledge was implicit in the court's instructions with respect to all three of the alleged grounds of negligence." (Appendix p. 5)

The Fifth Circuit did not view the charge to be faultless in this particular, but it was *not* persuaded that the

trial court's oversimplification misled the jury or confused its understanding of the critical fact issues before it. It concluded that the instructions read as a whole contained no reversible error. (Appendix p. 5)

REASONS WHY THE WRIT SHOULD BE GRANTED

This case presents the significant question of whether a jury issue or instruction on a controlling question of fact should be explicit, clear and straightforward. Is it sufficient for the federal courts of this country to just obliquely refer to a crucial fact issue in their summarization of a party's contentions? If not, an opinion by this Court in this case will serve notice that federal court litigants are entitled to a definite submission of material factual issues. We have not found an opinion by this Court on this point of law, and the casual treatment below of this controlling question of actual or constructive notice shows that now is the time for one.

A. Actual or constructive notice of a gas leak is a required antecedent finding before a jury can consider negligence.

The Fifth Circuit opinion was correct in recognizing that under Texas law a gas utility may not be liable for injuries caused by a gas leak unless it is first found that the utility knew or should have known of the leak. In addition to the two cases cited in the opinion (Appendix p. 3), see *McAfee v. Travis Gas Corp.*, 153 S.W.2d 442, 447 (Tex. 1941) and *Anno. Liability of Gas Company for Personal Injury or Property Damage Caused by Gas Escaping from Mains in Street*, 96 A.L.R.2d 1007, 1020 (1964).

B. The oblique reference to such notice in the summarization of the Plaintiffs' allegations in the Charge of the Court was not a fair and complete submission of this crucial fact question.

The Charge of the Court in this case is fatally defective because it did not clearly require the jury to find that the City of Perryton knew or should have known of the dangerous condition of its pipeline and of any need to repair it. This requirement should have either been in a clear instruction or in a separate issue. A notice finding should have been required before the jury considered the negligence questions.

The trial court has the discretion to use or not to employ the special verdict submission, but once it has decided to submit the case on special interrogatories, it is bound to submit all material fact issues. 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2506 (1971). Numerous Court of Appeal decisions, including some from the Fifth Circuit, are cited in support of this statement at footnote 63 of page 499 of the text. Again, we have not found a Supreme Court decision so holding.

Omitted from the Charge in this case was a direct and clear requirement for the jury to find actual or constructive notice before considering negligence. The jury instructions were not "fundamentally accurate" without the above conditional language requested by Perryton. The words quoted in the above sentence are from *Scheib v. Williams-McWilliams Co., Inc.*, 628 F.2d 509, 511-512 (5th Cir. 1980) where the district judge was affirmed because of the "comprehensive instructions" given on the issue there. To be contrasted is the charge complained

of in our case which failed to instruct the jury on the antecedent requirement of actual or constructive notice.

Looking at it from the jury's viewpoint, it was told of the Plaintiffs' allegation that the City failed to install cathodic protection when it knew or in the exercise of ordinary care should have known that the system was being harmed by the process of electrolysis. However, the question in S/I 1(a) was different; it was whether the City was negligent in failing to timely install cathodic protection. Thus, the jury was no doubt confused as to whether it had to find actual or constructive notice. Jurors do not have the benefit of legal training and of the applicable case law, as does a judge. How were the lay jurors in this case to know of the notice predicate unless the jury instructions clearly informed them?

It is unjust to uphold the judgment of the trial court when the jury instructions are so vague on this essential issue of actual or constructive notice. Lack of notice was the primary contention of the City during the trial, and a straightforward issue or instruction should have been given to the jury on this crucial question. The holding of the courts below, if allowed to stand, will lower the standards as to how clear jury issues and instructions should be on significant jury questions.

The summarization of the Plaintiffs' contention as to the failure to maintain the lines adjacent to the City's facility had the additional clause, ". . . in that it failed to properly search for and repair leaks". However, this just meant that a failure to inspect was being claimed by the Plaintiffs. It does not amount to a jury instruction on actual or constructive notice.

With respect to the alleged negligence in failing to replace the six inch line, neither the summarization of the Plaintiffs' contentions nor the wording of S/I 1 itself mentioned notice. The lower Court's opinion is that the summarization of the Plaintiffs' actual or constructive notice contention with respect to cathodic protection did not need to be repeated in the summarization of the Plaintiffs' negligence claims on maintenance and replacement of the pipeline.

The Charge was defective in not requiring the jury to find actual or constructive notice as a predicate to deliberating on any of the three alleged acts of negligence. There was nothing on notice in S/I 1; furthermore, the summarization of the Plaintiffs' allegations was on a separate page from S/I 1. What the Plaintiffs contended is one thing. What the trial court actually submitted to the jury is another; it is found only in S/I 1.

The trial judge clearly chose to not submit actual or constructive notice as requested by the City. Yet, the Court of Appeals held that the error was not harmful since actual or constructive notice was obliquely referred to in the summarization of one of three of the three negligence contentions of the Plaintiffs.

The jury's understanding of the issue was confounded. Certainly, the Charge was not a "fundamentally accurate" instruction that the jury was required to find actual or constructive notice before it could deliberate on the City's negligence. The Texas Supreme Court would certainly reverse a case that failed to submit a controlling issue. Tex. R. Civ. P. 277 and 279; *Scott v. Atchison T. & S.F. R. Co.*, 551 S.W.2d 740, 743 (Tex. Civ. App.—Beaumont 1977, aff'd) 572 S.W.2d 273 (Tex. 1978). This Court should reverse the decisions below.

This is a most significant issue to Perryton, and it had an excellent chance to win the notice question. Perryton had abundant evidence that it neither knew nor should have known of a problem in this area. It was entitled to a fair submission of this question. The City did not have a fair chance to win without it. Other parties in the federal court system are likely to receive similar treatment unless this Court takes this opportunity to require the Federal Judges to clearly submit material fact questions.

CONCLUSION AND PRAYER

Defendant City of Perryton prays that this Court grant a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit and to thereafter in due course reverse the cause and remand the same to the District Court for all actions not inconsistent therewith.

Respectfully submitted,

LEMON, CLOSE, SHEARER,
EHRLICH & BROWN

By: Otis C. Shearer
OTIS C. SHEARER

By: R. D. Lemon
ROBERT D. LEMON

P. O. Box 1066
Perryton, Texas 79070
(806) 435-6544

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari and the Appendices were mailed on this day to the attorney of record for Respondents Donald W. Jacks and wife, Bonnie Jacks, Robert L. Templeton, Templeton & Garner, P. O. Box 12075, Amarillo, Texas 79101.

DATED the 21 day of March, 1984.

Otis C. Shearer

OTIS C. SHEARER

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1253

Summary Calendar

DONALD W. JACKS and wife,
BONNIE JACKS,
Plaintiffs-Appellees,

v.

THE CITY OF PERRYTON, TEXAS,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(December 27, 1983)

Before GEE, POLITZ and JOHNSON, Circuit Judges.
POLITZ, Circuit Judge:

In this diversity case the City of Perryton appeals a jury verdict awarding damages to the plaintiffs-appellees for personal injuries suffered by Donald W. Jacks in a gas explosion accident. Mid-Continent Casualty Company, the workers' compensation carrier, successfully intervened. Finding no reversible error in the jury charge and no abuse of discretion in the denial of post-trial motions, we affirm.

A-2

Facts

Donald W. Jacks was a construction superintendent for S&T Construction Company. On the morning of April 18, 1979, he entered a darkened underground tunnel to ascertain whether water that had collected therein from the previous night's rain was too deep to permit his crew to work in the tunnel that day. The tunnel was part of the construction of a drive-through service facility being built by S&T for the First National Bank of Perryton. When Jacks ignited his cigarette lighter to examine the tunnel floor, he was immediately engulfed in the flames of a violent explosion. Jacks sustained second and third degree burns over two-thirds of his body.

In 1958, the City of Perryton purchased the privately owned natural gas distribution system that had served the city for 30 years. At the banksite, the city's six-inch gas main was located in the middle of a paved alley.

The bank construction called for placement of a steel tunnel under the drive-through area, adjacent to the alley that contained the six-inch gas main. Unbeknownst to Jacks, a large volume of gas had leaked from the main and collected in the tunnel. The flame from Jacks' lighter ignited this gas and caused the explosion.

The Jacks' tort suit charged Perryton and the bank with negligence. Specifically, they alleged that the city was negligent in failing to install cathodic protection for its gas distribution system, in failing to replace the aging gas line, and in failing properly to inspect, maintain and repair its system. They charged the bank with negligence in failing to protect Jacks from the danger caused by the gas leaking into the area under construction.

In response to special interrogatories, the jury exonerated the bank but found the city negligent on all three counts. The jury awarded the Jacks and the compensation carrier judgment against the city in the amount of $895,100. The trial court rejected the city's post-judgment motions for judgment n.o.v., new trial, and remittitur.

Analysis

The city asserts that the district court erred when it refused to instruct the jury that under Texas law, a gas utility may not be held liable for injuries caused by a gas leak unless it is first found that the utility knew or should have known of the leak. The city's interpretation of Texas law properly states the applicable law in this diversity case. *See, e.g., Blassingame v. Lone Star Gas Co.,* 236 S.W.2d 526 (Tex. Civ. App. 1950); *Lane v. Community Natural Gas Co.,* 123 S.W.2d 639 (Tex. 1939). However, we must be mindful of the limited scope of our appellate review of the jury instructions.

In *Coughlin v. Capital Cement Co.,* 571 F.2d 290, 300 (5th Cir. 1978), we set forth the standard against which the adequacy of a jury charge is to be measured on review:

> the test is not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues.

In *Scheib v. Williams-McWilliams Co., Inc.,* 628 F.2d 509, 511 (5th Cir. 1980), we held:

> In the review of jury instructions, a challenged instruction should not be considered in isolation but

> rather as part of an integrated whole. If, viewed in that light, the jury instructions are comprehensive, balanced, fundamentally accurate, and not likely to confuse or mislead the jury, the charge will be deemed adequate.

And in *Smith v. Borg-Warner Corp.*, 626 F.2d 384, 386 (5th Cir. 1980), we stated that our "jurisprudence mandates that we consider the charge as a whole, viewing it in the light of the allegations of the complaint, the evidence, and the arguments of counsel."

After examining the jury charge against this backdrop, we are convinced that the jury was not misled and that its understanding of the issues was not confounded. The court emphasized in its summary of the plaintiffs' allegations that the Jacks claimed that "the city failed to install cathodic protection for its gas distribution system when it knew or, in the exercise of ordinary care, should have known that the system was being harmed by the process of electrolysis." Although the court did not repeat the requirement of actual or constructive knowledge with respect to the two remaining charges of negligence, a fair reading of the instructions as a whole makes it clear that the jury was adequately charged as to the controlling provisions of Texas law. There can be little doubt that the requirement of an antecedent finding of either actual or constructive knowledge was implicit in the court's instructions with respect to all three of the alleged grounds of negligence.

The city makes a forceful argument in its reply brief, distinguishing between the city's duty to inspect and its duty to maintain the gas distribution system. Although the charge is not faultless in this particular, we are not per-

suaded that the court's oversimplification misled the jury or confused its understanding of the critical factual issues before it. We hold, therefore, that the instructions, read as a whole, contain no reversible error.

Finally, we find that the verdict is reasonable and supported by substantial evidence, *see Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc), and perceive no abuse of discretion in the trial court's rejection of the city's suggestion of remittitur. The jury's award is not "contrary to right reason" and the trial court's refusal to disturb it is not the result of "a clear abuse of discretion." *Perricone v. Kansas City Southern Ry. Co.*, 704 F.2d 1376 (5th Cir. 1983).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1253

D.C. Docket No. CA 2 80 76

[Filed February 7, 1984]

DONALD W. JACKS and Wife,
BONNIE JACKS,
Plaintiffs-Appellees,

v.

THE CITY OF PERRYTON, TEXAS,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas

Before GEE, POLITZ and JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission by the Court upon the record and briefs on file pursuant to Rule 34;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

DECEMBER 27, 1983
A true copy
Test:
GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals,
Fifth Circuit
By: H. E. ADAMS, JR.
Deputy
New Orleans, Louisiana
Feb. 3, 1984

ISSUED AS MANDATE: Feb. 3, 1984

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1253

[Filed January 27, 1984]

DONALD W. JACKS and Wife,
BONNIE JACKS,
Plaintiffs-Appellees,

v.

THE CITY OF PERRYTON, TEXAS
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

(January 27, 1984)

Before GEE, POLITZ and JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

HENRY A. POLITZ
United States Circuit Judge

APPENDIX D

The Plaintiffs have alleged that the explosion in question was caused by the escape of natural gas from the gas distribution system of the City of Perryton. Plaintiffs allege that the City of Perryton was negligent in the handling of the gas distribution system and that that negligence was a proximate cause, as that term has been defined to you, of the explosion and the injuries received by Donald Jacks. In particular Plaintiffs allege that the city failed to install cathodic protection for its gas distribution system when it knew or, in the exercise of ordinary care, should have known that the system was being harmed by the process of electrolysis; that it failed to exercise ordinary care to maintain the six-inch main and service lines under the City's control adjacent to the drive-in facility, in that it failed to properly search for and repair leaks; and that it was negligent in failing to replace the six-inch gas line adjacent to the drive-in facility.

The Defendant, City of Perryton, denies that it was negligent or that its negligence was the proximate cause of the occurrence. The burden of proof on this question is on the Plaintiffs.

APPENDIX E

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the Defendant City of Perryton was negligent (a) in failing to timely install cathodic protection, (b) in failing to exercise ordinary care to maintain the six-inch main adjacent to the drive-in facility or the service lines under the City's control, or (c) in failing to replace the six-inch gas line adjacent to the drive-in facility?

Answer "Yes" or "No" on each line of Column I.

If any of your answers in Column I are "Yes" was such negligence a proximate cause of the occurrence in question?

Answer "Yes" or "No" on the corresponding line of Column II.

	Column I Negligence	Column II Proximate Cause
(a) Failure to timely install cathodic protection	Yes	Yes
(b) Failure to maintain six-inch main and service lines under City's control	Yes	Yes
(c) Failure to replace six-inch gas line	Yes	Yes